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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

2019 NOV 18 P 2:59

CLEAR US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

IN RE: CAPITAL ONE CONSUMER )  
DATA SECURITY BREACH LITIGATION )  
\_\_\_\_\_ )

MDL No. 1:19md2915 (AJT/JFA)

This Document Relates to ALL Cases  
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**APPLICATION FOR APPOINTMENT OF PLAINTIFFS' STEERING COMMITTEE**

Pursuant to Paragraph 3(a) of Pretrial Order #1, Levin Sedran and Berman LLP ("LSB") (led by Charles E. Schaffer) makes this application for appointment to Plaintiffs' Steering Committee.<sup>1</sup>

A. Professional Experience in this Type of Litigation.

The firm's and Charles E. Schaffer's experience in handling class actions and other complex litigation meets that of any leadership contestant. LSB is one of the nation's preeminent and most experienced plaintiffs' class-action firms with extensive experience and expertise in consumer protection, products liability, data breach, privacy, antitrust, securities and other complex class-action litigation. *See generally*, LSB resume, attached as Exhibit "A". Through 35 years of serving its clients, the firm's attorneys have gained national recognition for their experience and skill and are frequently called upon to lead some of the largest class actions and mass torts in the country. *Ibid.*<sup>2</sup> I have been appointed to leadership positions in MDLs by

<sup>1</sup> LSB also supports the appointment of Martha A. Geer and Gary Mason of Whitfield Bryson & Mason LLP as Co- Lead Counsel and to the Steering Committee.

<sup>2</sup> For example, Courts have appointed the firm lead counsel or to other leadership positions in hundreds of other cases, which includes more than forty MDLs. LSB is presently serving or has served in such positions in several of the nation's largest and most technically complex class actions. *See e.g., In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, MDL No. 2047 (E.D. La.) (Lead Counsel); *In re Nat'l*

various different courts. *Ibid.* <sup>3</sup> I have concentrated my practice in representing consumers victimized by defective products, securing relief for consumers that are victims of data breaches and unfair or deceptive practices, as well as working cooperatively with others. *Ibid.* Through smart, efficient, strategy and tailored creative problem-solving, Mr. Schaffer and LSB have

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*Football League Players' Concussion Injury Litig.*, MDL No. 2323 (E.D. Pa.) (Plaintiffs Steering Committee and Subclass Counsel for Settlement); **Error! Main Document Only** *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010*, MDL No. 2179 (E.D. La.) (**Error! Main Document Only** Special Counsel to the Plaintiffs' Fee and Cost Committee); *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775 (E.D. N.Y.) (Co-Lead Counsel); *In re Wells Fargo Ins. Mktg. Sales Practices Litig.*, MDL No. 2797 (C.D. Ca.) (Plaintiffs' Executive Committee); *In re Apple Inc. Device Performance Litig.*, MDL No. 2827 (N.D. Ca.) (Plaintiffs' Executive Committee); and *In re Intel Corp. CPU Mktg. Sales Practices & Prods. Liab. Litig.*, MDL No. 2828 (C.D. Or.) (Plaintiffs' Executive Committee to represent the interests of governmental entities).

<sup>3</sup> My appointments in MDL litigation include *inter alia*: *In re Intel Corp. CPU Mktg. Sales Practices & Prods. Liab. Litig.*, MDL No. 2828 (C.D. Or.) (Appointed to Plaintiffs' Executive Committee to represent the interests of governmental entities); *In re Apple Inc. Device Performance Litig.*, MDL No. 2827 (N.D. Ca.) (Plaintiffs' Executive Committee); *In re Wells Fargo Ins. Mktg. Sales Practices Litig.*, MDL No. 2797 (C.D. Ca.) (Plaintiffs' Executive Committee); *In re Hill's Pet Nutrition, Inc. Dog Food Prods. Liab. Litig.*, MDL No. 2887 (D. Kan.) (Plaintiffs' Executive Committee); *In re JP Morgan Modification Litig.*, MDL No. 2290 (D. Mass.) (Plaintiffs' Co-lead Counsel); *In re IKO Roofing Prods. Liab. Litig.*, MDL No. 2104 (C.D. Ill.) (Plaintiffs' Co-lead Counsel); *In re HardiePlank Fiber Cement Siding Litig.*, MDL No. 2359 (D. Minn.) (Plaintiffs' Executive Committee); *In re Navistar Diesel Engine Prods. Liab. Litig.*, MDL No. 2223 (N.D. Ill.) (Plaintiffs' Executive Committee); *In re Azek Decking Sales Practice Litig.*, No. 12-6627 (D.N.J.) (Plaintiffs' Executive Committee); *In re Pella Corp. Architect & Designer Series Windows Mktg. Sales Practices & Prods. Liab. Litig.*, MDL No. 2514 (D.S.C.) (Plaintiffs' Executive Committee); *In re Navistar Diesel Engine Prods. Liab. Litig.*, MDL No. 2223 (N.D. Ill.) (Plaintiffs' Steering Committee); *In re CitiMortgage, Inc. Home Affordable Modification Program ("HAMP")*, MDL No. 2274 (C.D. Cal.) (Plaintiffs' Executive Committee); *In re Carrier IQ Consumer Privacy Litig.*, MDL No.: 2330 (N.D. Cal.) (Plaintiffs' Executive Committee); *In re Dial Complete Mktg. & Sales Practices Litig.*, MDL No. 2263 (D.N.H.) (Plaintiffs' Executive Committee); *In re Emerson Elec. Co. Wet/Dry Vac Mktg. & Sales Litig.*, MDL No. 2382 (E.D. Miss.) (Plaintiffs' Executive Committee); *In re Colgate-Palmolive Soft Soap Antibacterial Hand Soap Mktg. & Sales Practice Litig.*, (D.N.H.) (Plaintiffs' Executive Committee) and *Gold v. Lumber Liquidators, Inc.*, No.3:14-cv-05373-TEH (N.D. Cal.) (Plaintiffs' Executive Committee). Mr. Schaffer has also served in leadership positions in class actions which were not consolidated in an MDL. See Ex. A. I have also served in leadership positions in class actions which were not consolidated in an MDL.

recovered billions of dollars for victims of environmental disasters, defective products, data breaches and unfair or deceptive practices. *Ibid.*<sup>4</sup>

Of particular relevance to this litigation, Mr. Schaffer and LSB have extensive experience in data breach and privacy cases, including serving as a member of leadership in *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 2522 (D. Minn.) (settlement value \$39 million settlement for plaintiff financial institutions), *Green v. Accolade, Inc.*, 2:18-cv-00274 (E.D. Pa.) (where an employer data breach resulted in compromised employee PII); *Kuss v. Am. Home Patient, Inc.*, No. 8:18 -cv-0248 (M.D. Fla.) (where laptops were stolen and patient's medical information was compromised); *Abdelmessih v. Five Below, Inc.*, No. 2:19-cv-01487 (E.D. Pa.) (where retailer compromised customers' PII), and *In re Hudson's Bay Co. Data Sec. Incident Consumer Litig.*, No. 18-cv-8472 (S.D.N.Y.) (where retailer compromised customers' electronically-stored PII). In addition, in *In re Marriot Int'l Customer Data Sec. Breach Litig.*, MDL No. 2879 (D. Mass.), Mr. Schaffer has served as member of plaintiffs' screening or vetting committee and assisted leadership in vetting plaintiffs for inclusion in the consolidated amended complaint.

In addition, Mr. Schaffer and his firm also have experience in privacy cases, including serving as Co-lead counsel in *Bryd v. Aaron's Inc.*, No. 11-101 (W.D. Pa.) and *Peterson v. Aaron's Inc.*, No. 1-14-cv-1919 (N.D. Ga.) (where defendant placed spyware on rental

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<sup>4</sup> For example, Mr. Schaffer was instrumental in bringing about nation-wide settlements in *inter alia*: *In re Wells Fargo Ins. Mktg. Sales Practice Litig.*, MDL No. 2797 (\$423,500,000); *In re CertainTeed Corp. Roofing Shingles Prod. Liab. Litig.*, MDL No. 1817 (E.D. Pa.) (valued at \$815,000,000); *In re CertainTeed Fiber Cement Siding Litig.*, MDL No. 2270 (E.D. Pa.) (\$103,900,000); *Pollard v. Remington Arms Co.*, No. 4:13-CV-00086-ODS (W.D. Mo.) (valued at \$97,000, 000) and *In re JP Morgan Modification Litig.*, MDL No. 2290 (D. Mass.) (valued at \$506,000,000).

computers) and on the Executive Committee in *In re Carrier IQ, Inc., Consumer Privacy Litig.*, No. 12-md-1330 (N.D. Cal.) (where defendant placed software on mobile devices).<sup>5</sup>

B. Willingness and Availability to Commit to a Time-Consuming Project

As illustrated by its track record, LSB has repeatedly demonstrated its ability to commit to prosecuting cases through trial, and even post-trial appeals when necessary. *See, e.g., Exxon Valdez Oil Spill Litig.*, No. 889 0095 (D. Alaska); *Helman v. The Goodyear Tire & Rubber Co. ("Entran III")*, No. 12-00685 (D. Colo.); *Chinese-Manufactured Drywall Prod. Liab. Litig.*, MDL No. 2047 (E.D. La.); *Diet Drug Prod. Liab. Litig.*, MDL No. 1203 (E.D. Pa.); *Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La.); and *Asbestos School Litig.*, No. 83-0268 (E.D. Pa.). Mr. Schaffer and LSB is ready, willing and able to commit the necessary to efficiently prosecute this litigation to a successful conclusion.

C. Ability to Work Cooperatively with Others

LSB and Charles E. Schaffer have excellent working relationships with firms that have submitted applications for leadership in this case. LSB attorneys pride themselves on forming productive and collegial relationships with their co-counsel, and believe that such cooperative working relationships are necessary for effective representation especially in cases such as this one, when it will be critical to properly coordinate and manage numerous attorneys to successfully perform the necessary discovery required in what is often a short amount of time.

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<sup>5</sup> The *Carrier IQ* litigation involved Carrier IQ software placed on mobile devices that surreptitiously captured private information, including URIs, search terms, user names, passwords and geo-locations resulting in an invasion of privacy. During the litigation, Mr. Schaffer worked as part of the discovery and expert committees. After securing through discovery motions practice computerized records referred to by counsel for Google Inc. as "radioactive," Mr. Schaffer was instrumental in demonstrating that the software at issue was intercepting consumers' private SMS text messages. This led to a national class action settlement which provided monetary benefits to the class as well as changes to the way that the software is coded. The *Aaron's* litigation involves spyware surreptitiously placed on rental computers by the rental company resulting in an invasion of the consumer's privacy.

D. Willingness to Commit the Necessary Resources to Pursue this Matter at an Expeditious Pace.

LSB possesses both the financial and human resources necessary to successfully prosecute large-complex cases to trial. The firm is comprised of attorneys who are well versed in all stages of litigation against large, heavily funded defense firms. We do not use third-party financing and routinely advance substantial sums on behalf of our clients in complex cases, recovery of which is contingent upon the successful prosecution of the case and are prepared to do so here.

E. Any Compensation Arrangement that Counsel is Willing to Accept

LSB will seek benefits for the class including: 1) credit monitoring and identity theft insurance; 2) a cash fund to reimburse out-of-pocket losses and compensate time spent responding to the breach; and 3) injunctive relief via enhanced data security. These benefits are consistent with prior large data breach class action settlements. Credit monitoring for more than one year is particularly important because the risk of identity theft extends for many years after a criminal data breach.

If appointed as member of PSC, LSB would agree to the following fee structure:

- 2% of the value of credit monitoring *actually distributed* to class members; and
- 15% of any cash fund established to compensate class members.

This structure can be used as a baseline for evaluating the fee award, and the Court can exercise its discretion to award a higher or lower fee than the baseline. The Court could consider factors such as, *e.g.*, the existence of any injunctive relief; the stage of the proceedings at which the case was resolved; and any other factors the Court deems relevant.

CONCLUSION

LSB respectfully requests that Charles E Schaffer be appointed to the Plaintiffs' Steering Committee and Martha Geer be appointed as Co-Lead Counsel and Gary E. Mason E. be appointed to the Plaintiffs' Steering Committee.

Dated: November 18, 2019

Respectfully submitted,

/s/ Charles E. Schaffer

Charles E. Schaffer

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